No. 11898

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CASCADE COUNTY, MONTANA, and
THE HOME INSURANCE COMPANY,
NEW YORK, On Behalf of Itself
and All Other Insurance Companies
Similarly Situated,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

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Upon Appeal From The District Court of the United States for the District of Montana

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I.
STATEMENT OF JURISDICTION

A. *District Court Jurisdiction.*

The necessary jurisdictional facts appear from the appellants' *complaint* as follows: Each of the appellants is a corporate legal entity entitled to commence a cause of action in its own right and name. (Tr. p. 2) This cause of action was commenced in the District Court of the United States in and for the District of Montana, Great Falls Division, the district wherein the act or omission complained of occurred. (Tr. pp. 2 and 3) This cause of action involves a claim for money only, (Tr. pp. 3 and 10) accruing after January 1, 1946. (Tr. pp. 3 and 5) The claim arose on account of damage to and loss of property owned by the appellant, Cascade County, Montana, caused by the negligent and wrongful acts or omissions of officers and employees of the United States of America, appellee, acting within the scope of their office or employment. (Tr. p. 3) The appellant, The Home Insurance Company, New York, and seventy-one (71) other insurance companies similarly situated on whose behalf it acts as representative party, are all subrogee claimants, subrogated to the rights and claim of the appellant, Cascade County, Montana. (Tr. pp. 5-10)

The District Court of the United States, in and for the District of Montana, had original and exclusive jurisdiction to hear, determine, render judgment, and completely adjudicate any cause of action or claim arising out of the foregoing facts under the sovereign's statutory consent to be sued granted by the Federal Tort Claims Act. (Pub. Law 601, Title IV—Federal Tort Claims Act, Section 410 (a); 28 USCA, Sec. 931)

B. *Circuit Court of Appeals Jurisdiction*

On February 25, 1948, the Court below entered a *Decision and Order* dismissing the action of appellant, The Home Insurance Company, New York, both individually and in its repsesentative capacity, which, upon expiration of the time allowed for appeal, would have been final and conclusive of said appellant's claim both individually and as representative party. (Tr. p. 31) On March 23, 1948, the appellants filed a *Notice of Appeal* (Tr. p. 32) and on March 31, 1948, filed a *Designation of Contents of Record on Appeal* (Tr. p. 32), copies of both of which documents were served on the appellee (Tr. pp. 33 and 34), all within the time allowed for making an appeal.

Jurisdiction of the United States Circuit Court of Appeal for the Ninth Circuit is claimed under the provision of the Federal Tort Claims Act as follows: "Final judgments in the district courts in cases under this part shall be subject to review by appeal—(1) in the circuit courts of appeal in the same manner and to the same extent as other judgments of the district courts; . . . ." (Pub. Law 601, Title IV—Federal Tort Claims Act, Sec. 412 (a); 28 USCA Sec. 933 (a) 1). The provision of the federal statutes applicable to "other judgments of the district courts" is as follows: "The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—First. In the district courts, in all cases save where a direct review of the decisions may be had in the Supreme Court under section 345 of this title." (28 Judicial Code, Sec. 128, as amended; 28 USCA Sec. 225)

II.
STATEMENT OF THE CASE

On August 9, 1946, in the County of Cascade, State of Montana, United States Army Air Forces personnel, whose names are unknown to the appellants, all employees and officers of the United States of America, appellee, acting within the scope of their office and employment, flew three A-26 bomber type aircraft in such a reckless, careless and negligent manner that one of said aircraft crashed into Horse Barn "A," located on the Cascade County Fair Grounds and which was the property of the appellant, Cascade County, Montana, causing a fire which entirely destroyed said barn, causing a property damage in the total sum of $18,685.00. (Tr. p. 3)

On the day of this damage the appellant, The Home Insurance Company, New York, and 71 other insurance companies had contracts of insurance in force insuring the appellant, Cascade County, Montana, against loss or damage by fire or aircraft. (Tr. pp. 4 and 5) On account of these insurance contracts all of these companies became liable to pay and, on December 28, 1946, did pay to Cascade County, Montana, the sum of $8,550.00 (Tr. p. 5), being the sum of the pro rata shares paid by each of said companies under their respective policies of insurance (Tr. pp. 6 and 9) and the total liability of all the companies under all the policies according to the contract terms. (Tr. pp. 13-15)

On July 31, 1947, the appellants herein filed their complaint initiating this cause of action under the Federal Tort Claims Act. The insurance companies involved being 72 in number, it was impracticable to bring them all before the court in their individual capacity so The Home Insurance

Company, New York, was made a party plaintiff in its individual capacity and as a representative party on behalf of the 71 other insurance companies similarly situated as listed in the complaint.

On October 14, 1947, the appellee filed a *Motion to Dismiss The Home Insurance Company Both Individually and In Its Representative Capacity, as a Party Plaintiff* and *Notice of Hearing Motion to Dismiss.* (Tr. pp. 17-18) The motion came on for hearing and on February 25, 1948, the court below entered its *Decision and Order* (Tr. pp. 19-31) dismissing the action of the appellant, The Home Insurance Company, New York, both individually and in its representative capacity on the following grounds, as stated by the court below:

"(a) That the Federal Tort Claims Act does not provide a remedy for a claim based upon subrogation rights and prohibits the prosecution of such a claim by a subrogee; and

"(b) That this action is in conflict with and prohibited by the provisions of the Assignment of Claims Act, 31 USC 203." (Tr. p. 20) The sole question raised on this appeal is whether or not this *Decision and Order* was in error.

III.

SPECIFICATION OF ERROR RELIED UPON

The appellant, The Home Insurance Company, New York, subrogee of the appellant, Cascade County, Montana, both individually and in its capacity as a representative party for all insurance companies similarly situated, is a necessary and proper party to this cause of action arising under the Federal Tort Claims Act against the appellee, United States of America; and the *Decision and Order* of

the court below dismissing the action of The Home Insurance Company, New York, both individually and in its representative capacity, was in error.

IV.
SUMMARY OF ARGUMENT

A. *Assignment of Claims Act, 31 USCA Sec. 203, is not applicable to claims under the Federal Tort Claims Act, 28 USCA Sec. 921 et seq., of subrogee insurers acquired by operation of law.*

B. *The Federal Tort Claims Act, 28 USCA Sec. 931, includes subrogee insurers as claimants within its scope and effect.*

1. The express language of the statute includes subrogees as claimants.
2. Legislative history of the statute supports inclusion of subrogees as claimants.
3. Doctrine of *inclusio unius est exclusio alterius* supports inclusion of subrogees as claimants.

C. *Under Montana law, an insurer, compelled to pay an insured because of damage caused by a tort feasor, is subrogated* pro tanto *to the insured's right of action to recover from the tort feasor and is a necessary and proper party to the cause of action.*

V.
ARGUMENT

A. ASSIGNMENT OF CLAIMS ACT, 31 USCA SEC. 203, IS NOT APPLICABLE TO CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT, 28 USCA SEC. 921, ET SEQ., OF SUBROGEE INSURERS ACQUIRED BY OPERATION OF LAW.

The *Decision and Order* of the court below was partly based upon 31 USCA Sec. 203, for convenience referred

to herein as the Assignment of Claims Act, the applicable portion of which is as follows:

> All transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claims, or any part or share thereof . . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. (Title 31, Sec. 203, USCA; R. S. Sec. 3477, May 27, 1908, C. 206, 35 Stat. 411.)

In construing the applicability of this statute, the United States Supreme Court has recognized a clear distinction between voluntary assignments and assignments by operation of law; and the court has repeatedly held this statute does not apply to assignments of claims against the United States, or interests therein, caused by operation of law. A complete statement of the applicable rule of settled law was made in the case of National Bank of Commerce of Seattle vs. R. E. Downie, Trustee, 218 U. S. 345, 31 S. Ct. 89, as follows:

> In this connection it must be said that this court has held the statute in question does not embrace the transfer of a claim against the United States, where the transfer has been by operation of law, not merely as a result of voluntary assignment by the claimant. In Erwin vs. United States, 97 U. S. 392, 397, 23 L. Ed. 1065, 1067, this court, speaking by Mr. Justice Field, after referring to the act of 1853, embodied now in Sec. 3477 of the Revised Statutes, to prevent frauds upon the Treasury, said that it "applies only to cases of voluntary assignment of demands against the government. It does not embrace

cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy is not the evil at which the statute is aimed; nor does the construction given by this court deny to such parties a standing in the court of claims." This construction of the statute was recognized as settled law in Goodman vs. Niblack, 102 U. S. 556, 26 L. Ed. 229; St. Paul D & R Co. vs. United States, 112 U. S. 733, 28 L. Ed. 861; Butler vs. Goreley, 146 U. S. 303, 36 L. Ed. 981; Hager vs. Swayne, 149 U. S. 242, 37 L. Ed. 719; Ball vs. Halsell, 161 U. S. 72, 40 L. Ed. 622.

A tort claim is based upon the single indivisible liability of the tort feasor; and it is a settled equitable doctrine that an insuring company compelled to pay for damage caused by the negligence of another is, by operation of law, subrogated *pro tanto* to any cause of action the insured may have against the tort feasor.

Regan v. N. Y. and New England Ry. Co.,
60 Conn. 124; 22 A. 503, 25 Am. St. Rep. 306

Standard Marine Ins. Co. v. Scottish Metropolitan Assurance Co.,
283 U. S. 284, 51 S. Ct. 371

Brown v. Vermont Mut. F. Ins. Co.,
83 Vt. 161, 74 A. 1061, 29 L. R. A. (ns) 698

Pattitucci v. Gerhardt,
206 Wis. 358, 240 N. W. 385

Home Mut. Ins. Co. v. Oregon Ry. and Nav. Co.,
20 Ore. 569, 23 Am. St. Rep. 151

Blashfield on Negligence, page 206, Vol. 11

American Jurisprudence, page 999, Vol. 29

American Jurisprudence, page 707, Vol. 50

And even without express subrogation terms in the insurance contract, the insurer has an equitable right of subrogation by operation of law.

The Liverpool & Great Western Steam Co. v. Phenix Insurance Co.,
129 U. S. 397, 9 S. Ct. 469

The Atlas, 93 U. S. 302

Mobile & Montgomery R. Co. v. Jurey & Gillis,
111 U. S. 584, 4 S. Ct. 566

Phenix Ins. Co. v. Erie & Western Transp. Co.,
117 U. S. 312, 6 S. Ct. 750, 1176

It follows that the claim of an insurer, subrogated to a cause of action accruing to its insured under the Federal Tort Claims Act, does not fall within the prohibition of the Assignment of Claims Act which is applicable only to voluntary assignments and not to transfers of title by operation of law.

Wojciuk et al. v. United States,
74 F. Supp. 914

Niagra Fire Ins. Co. v. United States,
766 F. Supp. 850

Forrester v. United States,
75 F. Supp. 272

Hill v. United States,
74 F. Supp. 129

This court, in the case of Employers' Fire Insurance Company et al. vs. United States of America et al., 167 Fed. (2nd) 655, has held the Assignment of Claims Act does not apply to claims of subrogee insurers of claimants under the Federal Tort Claims Act. The court said:

> The Government finally seeks to invoke the limitations of the Anti-Assignment Act, 31 USCA S. 203. The Act has reference only to voluntary assignments of claims against the United States, and not to transfers of title by operation of law. Western Pacific Railroad Co. vs. United States, 268 U. S. 271; Morgenthau vs. Fidelity and Deposit Co., 94 F. 2nd 632.

Based on the foregoing authorities, it is submitted that the Assignment of Claims Act is inapplicable to this cause

of action; and that the *Decision and Order* of the court below is in error in holding the Anti-Assignment Act prohibits claims of subrogee insurers under the Federal Tort Claims Act and should, therefore, be reversed.

B. THE FEDERAL TORT CLAIMS ACT, 28 USCA SEC. 931, INCLUDES SUBROGEE INSURERS AS CLAIMANTS WITHIN ITS SCOPE AND EFFECT.

1. *The express language of the statute includes subrogee claimants.*

The specific language of the Federal Tort Claims Act which defines the class of claims included within the scope of its operation and the extent of Government liability, is as follows:

> Subject to the provisions of this title, the United States District Court . . . . shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States . . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this title, the United States shall be liable in respect of such claims *to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances,* except the United States shall not be liable for interest prior to judgment or for punitive damages. (Emphasis added. Part 3, Sec. 410 (a) Public Law 601, Title 28, Chapter 20, Section 931 (a) USCA)

When the language of a statute is plain and unambiguous, there is no occasion for construction.

U. S. v. Missouri Pac. Ry. Co.,
49 S. Ct. 133, 278 U. S. 269

Russell Motor Car Co. v. U. S.,
43 S. Ct. 428, 261 U. S. 514

In re Kunkle,
40 F (2nd) 563

U. S. v. Chicago, St. P. M. & O. Ry. Co.,
34 F (2nd) 812, (aff. 43 F (2nd) 300, 71 A. L. R. 507)

Kelleher v. French,
22 F (2nd) 341, (aff. 49 S. Ct. 35, 278 U. S. 563)

U. S. v. Ninety-Nine Diamonds,
72 C. C. A. 9, 139 F 961; 2 L. R. A. (ns) 185, (Cert. Den. 26 S. Ct. 760, 201 U. S. 645)

The purpose of the Federal Tort Claims Act is to grant a remedy and relief, by process in the Federal Courts, in cases where the United States is a tort feasor, to all claimants who would be entitled to bring a tort action and secure such relief under the laws of the state where the tort occurred. The plain, concise and unambiguous language of this statute puts the United States, as a party defendant in a tort action, in exactly the same position as a private individual would be under the law of the forum where the tort occurred. The act then goes on to define the extent of the liability of the United States by providing it shall be liable in respect of tort claims "to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances." By employing the language it did, it is clear and unequivocal that Congress intended to and did include subrogees as one class of claimants to which the United States granted its consent to be sued and to be liable in an action under the Federal Tort Claims Act. Admitting such a statutory

consent of the United States to be sued must be strictly construed, no other conclusion is tenable under this statute without ignoring or distorting the express language used.

Although a relatively new question, the contention of the appellants, that the express language of the Federal Tort Claims Act includes subrogee insurers as claimants within its scope and effect, is now supported by several decisions.

Town of Amherst v. United States,
77 F. Supp. 80

Charles Grace et al. v. United States,
76 F. Supp. 174

Insurance Co. of North America v. United States,
76 F. Supp. 951

Niagara Fire Ins. Co. v. United States,
76 F. Supp. 850

Wojciuk et al. v. United States et al.,
74 F. Supp. 914

Hill v. United States,
74 F. Supp. 129

South Carolina State Highway Dept. v. United States,
(Unreported, Eastern Dist. S. Carolina, June 15, 1948)

Employers' Fire Ins. Co. et al. v. United States et al.,
167 F. (2nd) 655; (reversing Rusconi v. United States, 74 F. Supp. 723)

Further, counsel has been advised that the United States Circuit Court of Appeals for the Sixth Circuit on June 3, 1948, handed down an opinion supporting appellants' contention and reversing the decision in Old Colony Ins. Co. vs. United States, 74 F. Supp. 723. This decision, however, has not been read by counsel for appellants and is still unreported.

In reaching the conclusion contended for by the appellants, the courts have advanced several sound reasons.

In the case of Niagara Fire Insurance Co. vs. United States, supra, Judge Medina, said:

> As said by Judge Cardoza, writing for the New York Court of Appeals in Anderson vs. Hayes Construction Co., 243 N. Y. 140, 153 N. E. 28, 29 (1926): "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

This same language of Judge Cardoza was quoted with approval as applicable to determination of the proper construction of the Federal Tort Claims Act in the case of South Carolina Highway Dept. et al. vs. United States, supra, and by this court in Employers' Fire Insurance Co. et al. vs. United States et al., supra.

In the case of Insurance Company of North America vs. United States, supra, the court said:

> A clearer or more sweeping waiver of immunity than that contained in Sec. 410 of the Act, 28 USC 931, is not easily phrased. Jurisdiction is granted "on any claim against the United States . . . under circumstances where the United States, if a private person, would be liable to the claimant for such damage . . . in accordance with the law of the place where the act or omission occurred," and further, "the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances. . . ." That can mean here no less than it says—that the United States may be sued for torts of negligence whenever an individual in Virginia may be sued. So bald is this declaration of sueability that no ground for construction seems available. No intimation arises to outlaw a subrogee and concededly Virginia would allow him to sue.

In the case of Wojciuk et al. vs. United States et al., supra, the court said:

> Furthermore, the history of the tort claims legislation strongly indicates there is no proper basis for the narrow construction urged by the government. Congress was greatly burdened by the large number of claims, based upon alleged negligence by employees of the federal government, presented at every Congressional session. Senators and Representatives were forced to spend on these multitidinous claims an amount of time disproportionate to their relative importance. When the Legislative Reorganization Act of 1946, 60 Stat. 812, was passed, Title IV thereof was the Federal Tort Claims Act. Members of Congress undoubtedly sighed in relief over the shift of the burden of determining merits of such negligence claims to the federal courts. It would be a strained and unwarranted interpretation of the intention of Congress to say it planned to give the district courts jurisdiction of cases brought by claimants originally suffering loss, but to reserve to itself the consideration of the claims of those standing in the shoes of original claimants by operation of law.

The reasoning of the court in the above case was sanctioned by this court in Employers' Fire Ins. Co. vs. United States, supra, when the court said:

> When the Legislative Reorganization Act of 1946, 60 Stat. 812, was passed, Congress shifted the burden of determining negligence claims to the Federal Courts in Title IV of that Act, namely, the Federal Tort Claims Act. Congress must have had in mind the existence of liability insurance and of the then existing practice in regard to subrogated claims. In fact, the attention of the House Claims Committee was specifically directed to the point by the Assistant Attorney General. Had Congress intended to exclude subrogated claims, it could have made provision similar to that in the Foreign Claims Act, 31 USCA s 244 (d), which contains the phrase, "including claims of insured but excluding claims of subrogees." We think that with this historical background the failure to expressly exclude subrogated

claims is strong evidence of an intention to include them. It does not seem reasonable to suppose Congress intended to transfer the power of determining original claims to the Federal Courts and to retain for itself the determination of claims of subrogees.

In the case of the South Carolina State Highway Dept. et al. vs. United States of America (unreported), Judge Waties Waring said:

> There is no reason or just basis for taking the position that the government is liable and must respond in damages for the tortious acts of its employees to one who did not have the foresight to protect himself by insurance, but that for equally negligent and tortious acts it is saved from reimbursement where prudence has effected insurance coverage. Would not this put a premium upon fraud and deception whereby insurance coverage would be kept secret and real parties in interest would be concealed, because to show the truth would negative a just claim. And so I am constrained not merely by weight of reasoned authority, but also by a sense of common fairness and justice to hold the insurance companies, the subrogees in this case, are entitled to become plaintiffs in their own rights and names, and I refuse to grant the motion to dismiss.

2. *Legislative history of the statute supports inclusion of subrogees as claimants.*

In the case of Niagara Fire Insurance Co. et al. vs. United States, supra, the opinion of Judge Medina contains a thorough analysis of the legislative history of the Federal Tort Claims Act and a comparison of that act with analogous acts governing other kinds of claims against the United States. The court concluded:

> Accordingly, the plain meaning of the words of the statute, the intention of the Congress as manifested in its legislation on other allied and analogous subjects, the historical background of the Act itself and the reasons which led to its enactment, all point in the same diection.

Section 931 must be deemed to have conferred upon the appropriate district courts jurisdiction to entertain and determine the claims of subrogees. This conclusion would seem also to dispose of the defenses to the effect that plaintiffs are not the real parties in interest.

This court has sanctioned the conclusion of the above case in its opinion in Employers' Fire Insurance Co. et al. vs. United States et al., supra, saying:

> The narrow construction urged by the Government finds no basis in the legislative history of the Federal Tort Claims Act nor in a comparison with analogous federal legislation. Prior to the enactment of the Federal Tort Claims Act, certain categories of claims, not in excess of $1,000.00 were disposed of administratively by virtue of the Small Tort Claims Act. Claims in excess of $1,000.00 were presented directly to Congress. The Small Tort Claims Act provided that the head of each department could determine any claim "on account of damage to or loss of privately owned property where the amount of the claim does not exceed $1,000.00." In connection with this language, the problem arose as to whether subrogated claims were included, and the Attorney General, on June 29, 1932, rendered an opinion that claims of subrogees were covered by the statute. (36 Op. Atty. Gen. 553) This interpretation of language nearly identical to that employed in the Federal Tort Claims Act was consistently followed by Congress in appropriating sums of money for the payment of subrogated claims thus certified; and moreover, a like interpretation was placed by the Comptroller General on other statutes in *pari materia,* containing the language "on account of damage to or loss of privately owned property." 19 Comp. Gen. 503, 506-7, Nov. 18, 1939; 21 Comp. Gen. 341, Oct. 17, 1941; 22 Comp. Gen. 611, Jan. 7, 1943. See Niagara Fire Ins. Co. vs. United States, (S. D., N. Y.) March 22, 1948.

Since the enactment of the Federal Tort Claims Act on August 2, 1946, and the commencement of litigation in-

volving the claims of subrogee claimants under that act, the House and Senate Judiciary Committees have had under consideration legislative bills to completely revise Title 28 of the United States Code, which includes the Federal Tort Claims Act.

Chapter 646, Public Law 773, 80th Congress.

The bill containing this complete revision, second session, was finally passed by the Senate on June 12, 1948, with amendments concurred in by the House on June 16, 1948. It was approved by the President on June 25, 1948, to become effective on September 1, 1948.

Several revisions were made in the Federal Tort Claims Act. It is significant that the language of the Act construed by this court and the several district courts was not changed. And although there were changes in phraseology of the section listing the twelve exceptions from the Act, there was no change to include subrogees as an exception. (Title 28, U. S. C., Congressional Service, pp. 1934-1937, 1636-1639, 1571)

Congress must have been aware of the litigation involving subrogee claimants under the act.

The Act was amended as late as June 12, 1948, by the Senate. Had Congress intended to exclude subrogees as claimants, it certainly would have done it at the time of complete revision of Title 28.

3. *Doctrine of Expressio Unius Est Exclusio Alterius supports inclusion of subrogees as claimants.*

In the case of Wojciuk et al. vs. United States et al., supra, the court said.

> Congress exercised great care in designating twelve different categories of claims which the Federal Tort Claims Act was not intended to cover. The claims here in question were not included in any such classification.

> The familiar maxim of interpretation, *expressio unius est exclusio alterius*, may be invoked. It is my opinion that plaintiff Casualty Company, as a subrogee of Wojciuk, is a proper claimant under the act.

And this reasoning in support of appellants' contention has been sanctioned by this court in Employers' Fire Insurance Co. vs. United States, supra, when the court said:

> In the Federal Tort Claims Act, Congress, though granting jurisdiction generally to the Federal Courts to render judgment on "any claim," designated twelve categories of claims to which the Federal Tort Claims Act was not meant to apply. Claims of subrogees were not included therein. Had Congress intended to exclude subrogated claims, it would have undoubtedly designated them as one of the categories which the Act was not meant to cover.

Based on the foregoing authorities appellants submit in conclusion that the Federal Tort Claims Act includes subrogee insurers as claimants within its scope and effect.

C. UNDER MONTANA LAW, AN INSURER, COMPELLED TO PAY AN INSURED BECAUSE OF DAMAGE CAUSED BY A TORT FEASOR, IS SUBROGATED *PRO TANTO* TO THE INSURED'S RIGHT OF ACTION TO RECOVER FROM THE TORT FEASOR AND IS A NECESSARY AND PROPER PARTY TO THE CAUSE OF ACTION.

The section of the Federal Tort Claims Act conferring jurisdiction on the federal district courts empowers them to hear, determine and render judgment on tort claims against the United States "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death *in accordance with the law of the place where the act or omission*

occurred." Thus, the Montana law governing the rights of an insurer as a subrogee is made applicable to this case.

It has long been settled in Montana that when an insurer is compelled to pay an insured because of a loss or damage to property caused by negligence of another, the insurer is subrogated *pro tanto* to the insured's right of recovery against the tort feasor.

This rule was first announced in Montana in the case of Caledonia Insurance Co. vs. Northern Pacific Ry. Co., 32 Mont. 46, 79 Pac. 544, the defendant's negligence destroyed a building owned by the insured, Harn, valued at $1,068.00, for which loss the plaintiff insurance company paid the insured $800.00 under the insurance contract. The insurance company then sued separately and in its own name to recover the amount of this payment from the tort feasor. In deciding this case, the Montana Supreme Court said:

> The next inquiry is, Was such a cause of action assignable? For subrogation is merely an equitable assignment, or an assignment by operation of law. Section 1351 of the Civil Code provides: "A thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner." It is clear in this instance Mrs. Harn's cause of action arose out of the violation of a right of property, and such a right of action or thing in action, is declared by this section assignable. . . . A general rule respecting the extent of the right acquired by subrogation in an action of this character is given in 27 Am. & Eng. Enc. of Law (2nd Ed.) 260, as follows: "If insured buildings or other property are destroyed through the fault or negligence of some person other than the owner, the insurance company upon payment of the loss, will be subrogated to the right of the owner to recover from the wrongdoer. This right of subrogation is frequently

enforced against railroad companies which have become liable to the owners of property on account of fires caused by their locomotives. And in some jurisdictions the right is confirmed by statute. The rights of the insurer against the wrongdoer can be no greater than those of the insured, and its recovery will be limited to the amount which it has paid on the loss."

The same language of the Montana code quoted by the court first appeared in the Civil Code of 1895, has been re-enacted in successive codes, and is now Section 6805 of the Revised Codes of Montana 1935.

The rule of the Caledonia Case was recognized and applied by the Montana Federal District Court in Gaugler vs. Chicago M. & P. S. Ry. Co., 197 Fed. Rep. 79. In that case, four non-resident insurance companies, compelled to pay part of loss caused by defendant's negligence, joined with the insured in the cause of action to recover from the tort feasor. The question was whether or not the defendant could remove the cause from the state to the Federal court on grounds of diversity of citizenship on a separable controversy. The court, making a thorough analysis of the Montana law, said:

These insurers by subrogation are equitable assignees, proportionate to the payments by them made to the insured, of parts of the insured's right of action against the defendant, the insured retaining part to himself. This assignment takes on all the aspect, in effect, of one by the most formal and express deed. Hall vs. Railway Co., 13 Wall. 370, 20 L. Ed. 594; Railway Co. vs. Insurance Co., 139 U. S. 235, 11 Sup. Ct. 554, 35 L. Ed. 154; Railway Co. vs. Car Co., 139 U. S. 87, 11 Sup. Ct. 490, 35 L. Ed. 97; Wager vs. Insurance Co., 150 U. S. 108, 14 Sup. Ct. 55, 37 L. Ed. 1013; U. S. vs. Tobacco Co., 166 U. S. 474, 17 Sup. Ct. 619, 41 L. Ed. 1081.

How these assignees shall assert their partial interests is a matter of parties and process, and depends upon the

laws of Montana; for therein, and by virtue of the conformity statute, in common law causes the Federal courts follow the state law wherein the court is held. Thompson vs. Railway Co., 6 Wall. 138, 18 L. Ed. 765; Albany, etc. vs. Lundberg, 121 U. S. 454, 7 S. Ct. 958, 30 L. Ed. 982; Delaware Co. vs. Safe Co., 133 U. S. 488, 10 S. Ct. 399, 33 L. Ed. 674; Glenn vs. Marbury, 145 U. S. 508, 12 S. Ct. 914, 36 L. Ed. 790; Railway Co. vs. Eckman, 187 U. S. 434, 23 S. Ct. 211, 47 L. Ed. 245. These cases declare the rule that, though an assignee of a chose in action whose right is equitable in that the legal title is in the assignor might sue in equity and at common law must sue in the name of the assignor, yet, if the state law permits him to sue in his own name, it furnishes a complete and adequate remedy, and he cannot merely because his interest is an equitable one maintain a suit in equity therefor in the federal courts on removal or otherwise. So that if the laws of Montana authorize the maintenance of this action as brought, and if the insurers are not mere nominal parties otherwise fully represented in the action, this court is without jurisdiction, and the case must be remanded.

The point here involved does not seem to have been expressly decided by the Montana Supreme Court, but in Caledonia Insurance Co. vs. Railway Co., 32 Mont. 46, 70 Pac. 544, an insurance company appears to have maintained without question an action, in its own name and alone, against a trespasser for recovery for a partial loss payment by it made to the insured. And it is common knowledge of the bench and bar of Montana, that on the theory that assignees in whole or in part of a chose in action are real parties in interest within the statutes of the state, since the enactments of said statutes, assignees of the entire chose have sued in their own names and assignees of part thereof have sued jointly with their assignors in the names of both, either without question or questioned unavailingly. Statutes like Montana's are for the purpose of changing the common law rule that rights of action are not transferable, and that all actions should be prosecuted by or in the name of the holder of the legal title to the cause of action, under which rule an assignee of the whole was compelled to

sue at law in the name of the assignor, and an assignee of part had no standing in a court of law, but in some cases could resort to equity. Blending law and equity in one form of civil action, such statutes adopt the equity rule in respect to parties—the action to be prosecuted in the name of and by the owner of the beneficial interest in the chose, who is entitled to the thing sued for, and by reason thereof is the real party in interst. See 30 Cyc. 47 et seq. 83. . . . Under like statutes to those aforesaid of Montana, it is generally held that insurers who have paid part of a loss may join with the insured in an action in the names of all against the trespasser to recover the whole loss. Insurance Co. vs. Railway Co., 45 Or. 53, 76 Pac. 1075, 67 L. R. A. 161, 2 Ann Cas. 360; Fairbanks et al. vs. Railway Co., 115 Cal. 579, 47 Pac. 450; Wunderlich et al. vs. Railway Co., 93 Wis. 132, 66 N. W. 1144; Railway Co. vs. Insurance Co., 53 Neb. 514, 73 N. W. 950; Railway Co. vs. Miller, 27 Tex. Civ. App. 344, 66 S. W. 139; Insurance Co. vs. Railway Co., 41 S. C. 408, 19 S. E. 859, 44 Am St. Rep. 725; See, also, First, etc., Society vs. Railway Co. (C. C.) 7 Fed. 260; Insurance Co. vs. Railway Co. (C. C.) 101 Fed. 509. These statutes abolish the frictions and technical rules of the common law in relation to assignments, parties and process, and simplify forms, procedure, and proceedings. They make for convenience and justice to all parties. The reasons for said rules failing, the rules fail with them. Use plaintiffs have no place in actions in Montana. The insured cannot sue to the use of the insurers and the insurers cannot sue to their use in the name of the insured.

I am of the opinion that the plaintiffs herein, coowners of the insured's right of action, were not only authorized by the state law to sue jointly as they did, but were compelled to do so. One compelled to join and joined in an action, and having a substantial interest therein, is not a nominal, but a necessary or indispensable party, whose citizenship must be regarded when jurisdiction depends on citizenship; for he sues not by a representative nor by representation binding him and

bound for him, but in his individual capacity. He is a real party in interest.

Based on the foregoing authorities, the appellants submit that under Montana law, made applicable to this cause of action by the Federal Tort Claims Act, an insurer compelled to pay an insured because of damage caused by a tort feasor, is subrogated *pro tanto* to the insured's right of action to recover from the tort feasor and is a necessary and proper party to the cause of action; and that the *Decision and Order* of the court below is in error in dismissing the action of the appellant, The Home Insurance Company, New York.

VI.

CONCLUSION

The appellants submit that since a subrogee insurer has a right of recovery against a tort feasor under Montana law, such subrogee insurer is a claimant within the scope and effect of the Federal Tort Claims Act and a necessary and proper party to a cause of action under that act. The *Decision and Order* of the court below dismissing the cause of action of the appellant, The Home Insurance Company, New York, both individually and in its representative capacity, is, therefore, in error and should be reversed by this court, and this cause of action remanded to the court below for further procedings accordingly.

This brief is filed for and on behelf of the appellants, Cascade County, Montana, and The Home Insurance Company, New York, both individually and in its representative capacity, and each of them, in connection with this appeal taken by and allowed to said parties.

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